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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAN ROUVEN FUECHTENER,

Defendant.

Case No: 2:16-cr-00100-GMN-CWH

MOTION TO STRIKE DEFENDANT'S
SECOND REQUEST TO WITHDRAW
GUILTY PLEA (ECF No. 282).

The United States of America, by and through the undersigned, files this motion to strike the Defendant's untimely and frivolous "Second Request to Withdraw Guilty Plea." ECF No. 282.

ARGUMENT

On June 22, 2017, the Defendant filed a motion to withdraw his guilty plea based on the alleged actions of his attorneys. ECF No. 194. On August 11, 2017, the Government responded. ECF No. 216. On August 28, 2017, the Defendant filed a reply raising new arguments related to the alleged actions of his attorneys. On December 21, 2017, the Court held oral argument on the matter, during which the Defendant

1 reiterated arguments based on the alleged actions of his attorneys as the basis for the
2 motion. ECF No. 226, 233.

3 The Court set the matter for an evidentiary hearing and set the parameters of the
4 hearing to be “the information provided in the motion and the reply and the response
5 that’s already been filled with the Court as well as the information provided here at the
6 evidentiary hearing.” ECF No. 233, at 62. Subsequently, the Court held five evidentiary
7 hearings on March 9, 2018 (ECF No. 248), April 16, 2018 (ECF No. 254), April 20, 2018
8 (ECF No. 255), May 11, 2018 (ECF No. 259), and May 16, 2018 (ECF No. 260). The
9 entirety of these hearings focused on the actions of the Defendant’s attorneys. *See id.*

10 The Court permitted the parties to file closing briefs by May 30, 2018 at noon.
11 ECF No. 260. The Court explained that it was for the parties to “highlight” evidence that
12 is “relevant to [the parties’] argument.” ECF No. 263, at 115. The Defendant filed an
13 untimely closing brief and advanced a completely new and different legal argument,
14 along with facts that were not elicited at the hearing – that the Government allegedly
15 did not act in “good faith” by “sneaking” facts into the plea agreement. ECF No. 265, at
16 13. The Government moved to strike that argument as untimely. ECF No. 266. The
17 Court granted the Government’s motion noting that “that Defendant’s new legal
18 argument . . . was available to Defendant when the Motion to Withdraw Plea was filed.”
19 ECF No. 269.

20 Now, after sentencing has been continued to accommodate Defense counsel, the
21 Defendant has filed a “Second Request to Withdraw Guilty Plea.” ECF No. 282. The
22 Motion is untimely and frivolous and should be stricken from the record for the same
23 reasons the Court struck the Defendant’s untimely argument.
24

1 The motion does not even attempt to offer a reasonable legal or factual
 2 justification as to why this argument, **which has been known to the Defendant**
 3 **since the time of the change of plea**, is being raised for the first time after the Court
 4 has indicated it will not entertain any more continuances of the sentencing date. The
 5 Defendant's motion is untimely and *deliberately designed* to: (1) frustrate the
 6 proceedings, (2) delay the administration of justice, (3) unnecessarily increase the
 7 workload of Government counsel in responding to frivolous motions on the eve of
 8 sentencing, and most importantly, (4) waste precious judicial resources in considering
 9 factually and legally unsupported arguments. The motion should be stricken.

10 Even if this Honorable Court is inclined to consider the untimely motion on the
 11 merits, the motion is frivolous, unsupported by law or fact, and should be summarily
 12 denied. A Court cannot convict a Defendant of both possession and receipt based on the
 13 same image on a single device. *See United States v. Davenport*, 519 F.3d 940, 944 (9th
 14 Cir. 2008). However, in the context of child pornography, a defendant may be convicted
 15 **both** of receipt and possession of the same image on two different devices. *United States*
 16 *v. Johnston*, 789 F.3d 934, 938 (9th Cir.), *cert. denied*, 136 S. Ct. 269 (2015).

17 Defense counsel frivolously argues that the plea agreement does not set forth facts
 18 to support each charge. The only way that argument holds water is if Defense counsel
 19 completely ignores the facts of the very plea agreement at issue.¹ No matter how much
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 22 ¹ The Government feels compelled to remind Defense counsel that she, like
 23 prosecutors, must adhere to the same ethical rules, including the duty of candor. Nevada
 24 Rule of Professional Conduct 3.1 provides that "a lawyer shall not . . . assert or controvert
 and issue . . . unless there is a basis in law and fact for doing so that is not frivolous."

1 the Defendant wishes it to be so, the plea agreement exists and the Court has found that
2 the “Defendant’s plea was knowing and voluntary,” and therefore valid and enforceable.
3 ECF No. 269, at 9. The Defendant cannot make the plea agreement disappear because
4 it is inconvenient to his most recent, fabricated and untenable position.

5 In the plea agreement, the Defendant admitted under the penalty of perjury that
6 “nine devices found in virtually every area of the house contained child pornography
7 videos and images. . .” ECF No. 146, at 5 (emphasis added). The Defendant further
8 admitted that “there were over 9000 child pornography videos found across devices.”
9 *Id.* (emphasis added). Even if these images are the same (which they are not), this
10 satisfies the multiple device requirement of *Johnston*. The Defendant also admitted that
11 “[t]he videos in the Defendant’s possession were downloaded [i.e. received] from the
12 internet by the Defendant.” *Id.* (emphasis added). This directly refutes the Defendant’s
13 woefully inadequate argument that the factual basis of the plea agreement is somehow
14 insufficient. Finally, the Defendant admitted that all those devices and others were
15 used to commit the crimes. *Id.* at 6.

16 If these facts are not enough to firmly convince the Court that the Defendant’s
17 argument has no factual support, the Defendant has also waived this challenge explicitly
18 in the plea agreement. *See id.* at 5 (“The defendant waives any potential future claim
19 that the facts he admitted in this Plea Agreement were insufficient to satisfy the
20 elements of the charged offenses.”)

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1 For the foregoing reasons, the Government respectfully requests that this Court
2 strike the Defendant's motion as being untimely and frivolous, or alternatively denying
3 it on the merits.

4 **DATED** this 10th day of August, 2018.

5 Respectfully,

6 DAYLE ELIESON
7 United States Attorney

8 / s / Elham Roohani

9

ELHAM ROOHANI
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that I am an employee of the United States Attorney's Office. A copy of the foregoing was served upon counsel of record, via Electronic Case Filing (ECF).

DATED this 10th day of August, 2018.

/ s / Elham Roohani

ELHAM ROOHANI
Assistant United States Attorney